No. 85-1404

Supreme Court, U.S.
FILED
MAR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

AFRO-AMERICAN POLICE ASSOCIATION, INC., *et. al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AFRO-AMERICAN POLICE ASSOCIATION, INC., *et al.*, IN RESPONSE TO THE UNITED STATES' PETITION FOR A WRIT OF CERTIORARI

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Whether this Court should hear this case, either on the petition of the United States or on our petition, depends largely, if not entirely, on whether the Court's forthcoming decisions in *Local 28 of the Sheet Metal Workers v. EEOC,* No. 84-1656, and *Local 93, International Association of Firefighters v. City of Cleveland,* No. 84-1999, will substantially resolve the issue presented here. Both of those cases have now been argued and are *sub judice.*

As we said in our own petition,[1] the issue presented in this case is an important one. The United States has taken the position in this case, and has announced its intention to take the same position in 50 other cases around the country, that prospective race-conscious relief benefitting persons who were not proven victims of discrimination, is unlawful. Although

[1] In order to give this Court the option to consolidate this case with *Local 28* and *Local 93,* we filed a petition, as permitted by 28 U.S.C. § 1254(1) (1982), for a writ of certiorari even though we prevailed in the court of appeals.

every court of appeals to have considered that question has decided otherwise, the United States is apparently intent on pressing its position in the lower courts until it receives a definitive decision from this Court. Indeed, although we have prevailed at every stage of this litigation, there is no reason to believe that the United States will not continue to question the lawfulness of the Buffalo decree or that it will affirmatively seek to enforce it, until this Court explicitly decides whether that decree is lawful.

Unlike *Local 28,* where the order before the Court is a contempt citation that does not directly raise the issue of the lawfulness of prospective race-conscious relief, this case squarely presents that issue. The Department of Justice brought this suit in 1973. After a full trial on the merits, and after findings of intentional discrimination, the Department sought and obtained an order containing such prospective relief and defended that order in the court of appeals in 1980. In 1985, however, the Department returned to the district court contending that such relief is unlawful.

We believe that this Court should now decide the question presented here, whether in this case or in some other case. For that reason, we acquiesce in the United States' petition and leave it to the Court to decide whether further briefing and oral argument would be helpful.

March 12, 1986.

Respectfully submitted,

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